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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY G. BENNETT, Defendant and Appellant.	A123431 (San Francisco City & County Super. Ct. No. 204961)

I. INTRODUCTION

Anthony G. Bennett (Bennett) appeals from his conviction of making a criminal threat. He contends the trial court erred in admitting evidence of a prior similar incident, thereby depriving him of his due process rights. We conclude there was no evidentiary error and affirm the judgment.

II. PROCEDURAL BACKGROUND

The San Francisco District Attorney charged Bennett by information with one count of violating Penal Code section 422 (making a criminal threat). A jury convicted Bennett, and the trial court sentenced him to the lower term of 16 months in state prison. This timely appeal followed.

III. FACTUAL BACKGROUND

On March 13, 2008, Keta Williams was working as a station agent for Bay Area Rapid Transit (BART) at the Fourth and Market Street station. She and her colleague, Yolanda Mitchell, were in the station booth. Williams saw Bennett start to enter the

transit area through the emergency gate. She told him he needed to enter through the regular fare gate.

Bennett did not comply. He continued going through the emergency entrance and headed toward the station booth, "[c]harging" at Williams and "swearing forcefully." Bennett loudly repeated " 'What did you say, bitch,' " and "seemed very angry."

Williams closed the booth door because she "thought he was going to come into the booth and assault [her.]" As Bennett approached the booth, he kept repeating " 'Fuck you in your ass, bitch' " and " 'I'll beat the fuck out of you.' " When he got to the booth, he began pounding on the glass with his closed fist for about three minutes. Mitchell told Williams they should call the police because Bennett was "very loud, very angry, really scary."

Williams "felt threatened" and, with shaking hands, called BART police. She believed Bennett would carry out his threats because "when people fare evade, they go to take the train. They don't come toward you screaming and yelling and hitting on the door and cursing at you and continuing the threat until they leave the station."

Bennett then exited through a different emergency gate, went around to the front of the station booth, and "started doing the same thing." He "continued to hit the glass and repeat the same things he had been saying previously." Bennett left before police arrived, after about two additional minutes of hitting the glass and swearing. The last thing Bennett said was " 'I'm gonna get you, bitch.' " Williams did not feel safe. BART police arrived about five minutes later, but could not find Bennett.

About two weeks later, Williams saw Bennett at the same BART station. She "recognized him right away" and called the police. She identified Bennett, and police apprehended him on a BART platform. Williams did not want Bennett to see her because she was afraid. She felt "uneasy" testifying "because of his erratic behavior."

The trial court allowed the prosecution to introduce evidence of a similar incident involving Bennett. Angelique Stacy, an employee of Good Vibrations retail store in San Francisco, testified about an encounter she had with Bennett on September 3, 2007, about six months before the BART incident. Stacy noticed Bennett in the store "muttering"

about the videos. She walked over and asked him to please be quiet. Initially, Bennett agreed to keep his opinions to himself. A few seconds later, however, he picked up some videos and began swearing and making derogatory comments about gay men. Stacy approached Bennett again and said "Sir, that language is not welcome here." Bennett started yelling " '[f]uck you, white bitch.' " Stacy was frightened, moved behind the counter and asked him to leave. Bennett followed her, saying " 'Bitch, I'm going to fuck you in the ass until you die.' " He also told Stacy he knew where she worked and he was going to come back for her. Stacy was "[s]cared to death," because Bennett was "very agitated" and "looked like he meant business." She told him she was going to call the police. Bennett left before police arrived.

IV. DISCUSSION

A. Standard of Review

Bennett claims the trial court erred in admitting evidence of the incident at the Good Vibrations store because it was relevant only to show his disposition to commit the charged offense.

We review evidentiary rulings for abuse of discretion. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203; *People v. Gray* (2005) 37 Cal.4th 168, 202.) If an abuse is found, we then consider whether admission of the evidence was prejudicial, i.e., whether there is a reasonable probability a result more favorable to Bennett would have been reached had evidence of the Good Vibrations incident not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.)

B. Evidence of Uncharged Misconduct

Evidence of a defendant's prior misconduct is not admissible to prove his or her bad character or disposition. (Evid. Code, § 1101, subd. (a).)[1] " 'Section 1101 prohibits the admission of other-crimes evidence for the purpose of showing the defendant's bad character or criminal propensity.' [Citation.] As with other circumstantial evidence, its

[1] All further statutory references are to the Evidence Code unless otherwise indicated.

admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence or absence of some other rule requiring exclusion." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 203.)

Other-crimes evidence may be admissible, however, "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (§ 1101, subd. (b).) Evidence of other-crimes is admissible " 'only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.' " (*People v. Scheer, supra,* 68 Cal.App.4th at p. 1018, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 369.) " 'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.' " (*People v. Scheer, supra,* 68 Cal.App.4th at p.1018, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Penal Code section 422 provides in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . ." Accordingly, to secure a conviction for making a criminal threat, the prosecution must prove the defendant intended his or her statement be taken as a threat and the victim was reasonably in sustained fear for his or her safety.

"Criminal intent will rarely be shown by direct evidence and must frequently be inferred from a defendant's conduct. . . . Intent may properly be inferred from evidence of other specific acts of a similar nature." (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380.) "[T]he doctrine of chances teaches that the more often one does something, the

more likely that something was intended, and even premeditated, rather than accidental or spontaneous." (*People v. Steele* (2002) 27 Cal.4th 1230, 1244.)

The trial court allowed evidence of the Good Vibrations incident on the grounds it was relevant to show intent and common plan and it was not more prejudicial than probative under section 352. The court explained "There is probative value. . . . It's substantially similar conduct. It negates any tendency to think that this is mere[ly] responsive to . . . officious conduct on the part of the station officials or that it's a response to some unreasonable official request or arrogant official request." The court also gave a limiting instruction immediately before Stacy's testimony, telling the jury: "I'm letting in this testimony for the limited purpose, as I'm going to explain to you right now, as it may bear or not bear on intent, as it may bear or not bear on motive, as it may bear or not bear on absence of mistake on the defendant's part."

The trial court did not abuse its discretion. Given the defense's argument that Bennett was known to walk around muttering and shouting, his intent when yelling at Williams was at issue. The Good Vibrations incident was relevant to whether he intended his statements to Williams be taken as a threat or whether, as he claimed, he was simply being "obnoxious and rude." The Good Vibrations incident was also relevant to the issue of whether Williams was "*reasonably* . . . in sustained fear for . . . her own safety." (Pen. Code, § 422, italics added; see *People v. Stern* (2003) 111 Cal.App.4th 283, 296 [evidence of uncharged offense admissible regarding victim's believability].) The defense's opening argument emphasized Williams "has seen [Bennett] before. She's aware that he walks around mumbling and talking out loud to himself and hollering to himself . . . . [¶] . . . [¶] . . . She certainly wasn't in sustained fear that something actually was going to happen that would cause her great bodily injury, and if she had that level of fear, it was a completely unreasonable response to what happened in the situation; and an unreasonable response to an altercation between two people that takes a matter of seconds cannot be the source of a criminal conviction for a felony criminal threat." Stacy's testimony that Bennett's similar actions and words frightened her and caused her

to believe he would carry out his threats was evidence Williams' fear for her own safety was reasonable.

Even if the trial court abused its discretion by admitting Stacy's testimony, it was harmless error. There is no reasonable probability Bennett would have achieved a more favorable result in the absence of evidence of the Good Vibrations incident. There was no dispute about what Bennett said to Williams or that he charged at her and pounded on the station booth windows. Williams' and Mitchell's testimony, as well as the fact Williams called the police, also establish she was reasonably in fear because of Bennett's threatening conduct and statements.

V. DISPOSITION

The judgment is affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.